

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 14, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2016AP2169

Cir. Ct. No. 2010CV1576

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**IN THE MATTER OF THE REHABILITATION OF
SEGREGATED ACCOUNT OF AMBAC ASSURANCE CORPORATION:**

SEAN DILWEG AND OFFICE OF THE COMMISSIONER OF INSURANCE,

PLAINTIFFS-RESPONDENTS,

V.

**CARLISLE/PICATINNY FAMILY HOUSING L.P., FORT BLISS/WHITE
SANDS MISSILE RANGE HOUSING L.P., FORT DETRICK/WALTER REED
ARMY MEDICAL CENTER HOUSING LLC, STEWART HUNTER HOUSING
LLC, MONTEREY BAY MILITARY HOUSING LLC, MONTEREY BAY LAND
LLC, MEADE COMMUNITIES LLC, BRAGG COMMUNITIES LLC, POLK
COMMUNITIES LLC, RUCKER COMMUNITIES LLC, RILEY COMMUNITIES
LLC, FORT LEE COMMUNITIES LLC AND FORT LEAVENWORTH
FRONTIER HERITAGE COMMUNITIES, II, LLC,**

INTERESTED PARTIES-APPELLANTS.

APPEAL from an order of the circuit court for Dane County:
RIHCARD J. NIESS, Judge. *Affirmed.*

Before Lundsten, P.J., Sherman and Blanchard, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Carlisle/Picatinny Family Housing L.P., Fort Bliss/White Sands Missile Range Housing L.P., Fort Detrick/Walter Reed Army Medical Center Housing LLC, Stewart Hunter Housing LLC, Monterey Bay Military Housing LLC, Monterey Bay Land LLC, Meade Communities LLC, Bragg Communities LLC, Polk Communities LLC, Rucker Communities LLC, Riley Communities LLC, Fort Lee Communities LLC and Fort Leavenworth Frontier Heritage Communities, II, LLC (collectively the military housing developers or the MHPI Projects) appeal an order entered by the circuit court in the ongoing rehabilitation proceeding for the Segregated Account of Ambac Assurance Corporation. The circuit court issued the order at the request Wisconsin Insurance Commissioner (the rehabilitator), to clarify or declare the meaning of certain provisions contained in prior orders of the court. For the reasons discussed below, we affirm the circuit court’s order (the clarification order).

BACKGROUND

¶2 The MHPI projects consist of public-private partnerships for military housing developments at thirteen U.S. Army bases across the country. In order to secure construction loans for the housing developments, the MHPI projects

purchased various bond insurance and surety bonds from the Ambac Assurance Corporation (Ambac).

¶3 In 2010, in order to save Ambac from insolvency in the wake of the collapse of the mortgage-backed securities market, the Wisconsin Insurance Commissioner established a segregated account for Ambac's greatest liabilities and initiated a rehabilitation proceeding for the segregated account. *See generally Nickel v. Wells Fargo Bank et al.*, 2013 WI App 129, ¶¶2-9, 351 Wis. 2d 359, 841 N.W.2d 482. The MHPI project's policies remained in the Ambac's general account, and thus were not directly subject to the rehabilitation plan. *Id.*

¶4 As an additional consequence of Ambac's distress, Ambac's credit rating declined below the levels that the MHBI projects were required to maintain on their surety bonds by the MHPI projects' construction loan documents. Eventually, in 2015, Ambac demanded that the MHPI projects pay over \$200 million cash into debt service reserve accounts to replace the surety bonds that had been adversely affected by Ambac's downgraded credit. The MHPI projects objected to the demands, leading to ongoing litigation in six different states related to the debt service reserve accounts.

¶5 Among the arguments being advanced by the MHPI projects in the multi-state litigation over the debt service reserve accounts is that certain provisions in the rehabilitation plan for Ambac's segregated account triggered "credit enhancer defaults" under the various MHPI projects' policy and surety documents. One example of such a credit enhancer default would occur if a court were to appoint a "receiver for Ambac or for all or any material portion of its property" or to authorize "the taking of possession by a ... receiver of Ambac (or taking possession of all or any material portion of Ambac's property)." The MHPI

projects contend that this and similar credit enhancer default clauses would bar Ambac from enforcing other provisions that might otherwise allow Ambac to force cash funding of the debt service reserve accounts.

¶6 On July 15, 2016, the Wisconsin Insurance Commissioner, acting in his capacity as the rehabilitator for the segregated Ambac account, filed a motion seeking to “clarify” what the commissioner characterized as “certain determinations already made in the Rehabilitation Order, the Confirmation Order, or the decision of the Court of Appeals affirming the Confirmation Order.” The rehabilitator expressly told the circuit court that he was seeking the order “for purposes of being considered by [the] courts” in other jurisdictions, where the multi-state litigation over the debt service reserve accounts was pending.

¶7 On October 24, 2016, the circuit court issued the order that is the subject of this appeal, to provide clarification about the nature of the rehabilitation proceeding “in connection with certain litigation pending in other jurisdictions” that involve characterizations of the rehabilitation plan and confirmation order previously issued by the circuit court and affirmed by this court. The circuit court’s clarification order contained seventeen paragraphs summarizing various aspects of the rehabilitation proceeding, including factual findings that:

OCI’s Decision to Limit Rehabilitation to the Segregated Account

....

6. In the course of its investigation of Ambac, OCI [the office of the insurance commissioner] became aware that many of Ambac’s contracts contain language, referred to as “triggers,” providing that placing Ambac into rehabilitation or liquidation proceedings would constitute a default....

7. Thus, OCI sought an approach that could address Ambac’s acute financial challenges “in a manner

that would not trigger covenants and cause defaults in thousands of Ambac policies.” ...

....

9. Accordingly, the Rehabilitation Order [provided that] ... the Rehabilitator “shall take possession of the assets of the Segregated Account,” and ... “manag[e] the affairs of the Segregated Account.” These provisions do not refer to taking possession of the assets of Ambac or managing the affairs of Ambac.

10. Given the precautions that OCI took to limit these Proceedings to the Segregated Account, and its reasons for avoiding a rehabilitation of Ambac as a whole, *it would run counter to OCI’s stated purpose in adopting this measured approach to rehabilitation if the existence of these Proceedings is considered to be the commencement of a rehabilitation of Ambac, the entry of an order of relief against Ambac by this Court, the appointment of a rehabilitator for Ambac, the taking possession of Ambac’s assets, or the appointment of an official to manage the affairs of Ambac.* (Emphasis added.)

Formation and Capitalization of the Segregated Account

11. ... OCI was aware that many of Ambac’s contracts “contained provisions restricting Ambac’s transfer of assets away from the General Account.” ... Based on these contractual provisions, OCI was concerned that providing capital for the Segregated Account through a material transfer of assets from Ambac “would have created massive litigation as well as substantial loss to Ambac.” ...

12. Therefore, OCI opted to capitalize the Segregated Account in a matter that avoided “allocating hard assets directly to the Segregated Account at its establishment.” ... OCI decided to leave the bulk of the insurer and its assets outside of rehabilitation “due to the existence of the triggers in transactions insured by Ambac relating to delinquency proceedings and assets transfers.”

...

....

14. ... In other words, OCI’s objective was to capitalize the Segregated Account in a way that would provide adequate funding going forward from the assets of

the General Account, but *not* through a transfer of assets from Ambac that could trigger the adverse provisions contained in numerous Ambac contracts.

....

16. Indeed, the Court of Appeals rejected an argument that the Plan of Rehabilitation constituted a transfer of assets [from the Segregated Account to the General Account] without fair consideration

17. Given these considerations, *it would run counter to OCI's stated purpose of capitalizing the Segregated Account in a manner that avoided triggering contractual defaults and causing collateral damage if Ambac's issuance of the Secured Note and Excess-of-Loss Reinsurance Agreement were considered to constitute a transfer of assets from Ambac to the Segregated Account or the appointment of a receiver for Ambac's assets.* (Emphasis added.)

The MHPI projects challenge this order on appeal.

STANDARD OF REVIEW

¶8 We will independently review whether an issue is “ripe” or justiciable, as opposed to merely advisory or hypothetical. *See Olson v. Town of Cottage Grove*, 2008 WI 51, ¶39, 309 Wis. 2d 365, 749 N.W.2d 211.

¶9 We will not set aside a factual finding unless it is clearly erroneous—meaning that after accepting all credibility determinations made and reasonable inferences drawn by the fact-finder, the great weight and preponderance of the evidence support a contrary finding. *Noll v. Dimiceli's, Inc.*, 115 Wis. 2d 641, 643-44, 340 N.W.2d 575 (Ct. App. 1983).

DISCUSSION

¶10 The MHPI projects challenge the circuit court order on three grounds: (1) that it constitutes an improper advisory opinion; (2) that it includes

factual findings that were unsupported by the record and made without holding an evidentiary hearing; and (3) that its findings with regard to collateral damage are inconsistent with the facts that exist today. We address each argument in turn.

Advisory Opinion

¶11 The MHPI projects first contend that the circuit court’s order constituted an impermissible advisory opinion because there was no “controversy” pending before the circuit court, and because the circuit court had no authority to answer questions that are pending in other jurisdictions. This contention fails on both points.

¶12 First, the assertion that the circuit court’s decision constitutes an improper advisory opinion ignores the nature of a rehabilitation proceeding, which is not adversarial in nature and requires no “controversy” in the traditional sense. Rather, there is an ongoing relationship between the rehabilitator and the subject of the rehabilitation until the rehabilitation plan has been completed. The circuit court has continuing jurisdiction over the rehabilitation proceeding until the rehabilitation plan has been completed.

¶13 As part of his obligations as rehabilitator, the commissioner may be required to participate in litigation in other states that could affect the rehabilitation plan. In that context, it is appropriate for the commissioner to seek any clarification that he requires from the circuit court about the rehabilitation plan before asserting a position in another court. We therefore agree with the circuit court that the commissioner’s request fell within the scope of WIS. STAT. § 645.05(1)(k) (2015-16), which authorizes a receiver to apply for any order necessary to prevent any “threatened or contemplated action that might lessen the

value of the insurer's assets or prejudice the rights of policyholders, creditors or shareholders, or the administration of the proceeding.”

¶14 Second, the circuit court's order expressly declines to address the ultimate legal question in controversy in other jurisdictions—namely, whether the rehabilitation plan for Ambac's segregated account triggered “credit enhancer default[s]” under the language of various MHPI projects' policy and surety documents. Rather, the clarification order largely reiterates previously made findings about the structure and intended purpose of the rehabilitation plan, taken from the confirmation order and this court's decision affirming the confirmation order. In other words, the clarification order addresses the rehabilitation plan's *purpose* in segregating Ambac's toxic assets from its general account and the structure it created to do so, not whether the plan's structure was actually *effective* in avoiding any of the specific credit enhancer default provisions in general account policies that are currently at issue in the multi-state litigation. The purpose of the rehabilitation plan was integral to this court's prior review of the plan's confirmation. To that extent, we are not persuaded that the clarification order would have any greater effect on the litigation in other jurisdictions than the prior decisions that it seeks to clarify, and we reject the contention that the clarification order constitutes an advisory opinion.

Findings Regarding Rehabilitator's Management or Possession of Assets

¶15 The MHPI projects contend that, because the circuit court acknowledged that it did not make any prior findings specifically relating to any of the policies in the general account, and because it did not hold an evidentiary hearing, the court had no factual basis for its findings, in paragraphs 10 and 17 of the clarification order, that it would be “counter” to the stated purpose of the

rehabilitation plan to construe the plan as allowing the rehabilitator of the segregated account to manage or take possession of Ambac’s assets. The MPHI projects also complain that they were deprived of the opportunity to conduct discovery with regard to “disputed findings” regarding the facts underlying the order confirming the rehabilitation plan—which we take to be those same findings about the rehabilitator’s control over the assets in Ambac’s general account.

¶16 We first note that no additional evidentiary hearing was required because the rehabilitator was seeking clarification of prior decisions, based upon the record that had already been established. As to discovery regarding that record, we reiterate that a rehabilitation proceeding is not an adversarial lawsuit. *Nickel*, 351 Wis. 2d 359, ¶101. There are no “parties” aside from the subject of the rehabilitation, and as such, the statutory rules of discovery for civil cases do not apply. Again, the clarification order at issue here was entered at the request of the rehabilitator, to clarify facts about the rehabilitation proceeding that the rehabilitator might need to assert in outside litigation as part of his ongoing duty to execute the rehabilitation plan. In short, the MPHI projects—who have no policies in the segregated account that is the subject of the rehabilitation plan—have shown no basis to obtain either a hearing or discovery regarding an order clarifying that plan.

¶17 Next, the MPHI projects have not shown that the circuit court’s finding—that it would be counter to the stated purpose of the rehabilitation plan to construe the plan as allowing the rehabilitator of the segregated account to either manage or take possession of Ambac’s assets—was clearly erroneous. The MPHI projects point to various statements in the record acknowledging that, given the large number and variety of policies involved, it would probably not be possible to “craft [an injunction] that would affect and adjoin all of those covenants and

triggers,” and argue that such statements are inconsistent with the circuit court’s findings in the clarification order. However, that argument conflates two distinct questions: whether the rehabilitation plan for the segregated account authorizes the rehabilitator to manage or possess the assets of Ambac, and whether the structure of the rehabilitation plan triggers any specific default language in a policy in the general account. The circuit court did not make any finding or proffer any opinion as to the second question, and its findings on the first question were fully supported by the record.

Finding About Collateral Damage

¶18 Finally, the MHPI projects contend that the circuit court’s clarification order is “misleading given the undisputed facts today, which do not support any finding of any risk of ‘collateral damage’” due to the expiration of most of the policies that were in effect at the time the rehabilitation plan was approved. However, the circuit court did not make a finding that enforcing any credit enhancer default provisions at stake in the MHPI projects’ outside litigation would result in collateral damage today. Rather, the circuit court found that attempting to avoid or minimize collateral damage was a major factor in how the rehabilitation plan was structured. That finding was fully supported by the record and is not clearly erroneous.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2015-16).

